

A Writing On Copyright: Jessica Litman's *Digital Copyright* (2001)

A critical book review by Lev Ginsburg (Articles Editor)

If you are looking for a clear and illuminating analysis of the major issues facing copyright owners, content developers, and the public that consumes copyrighted works, then Professor Litman's DIGITAL COPYRIGHT is a great place to start.¹

DIGITAL COPYRIGHT is not geared exclusively for the needs of either the scholar or of the average interested reader; it is likely to be able to serve both types of individual quite well. Professor Litman's concise volume provides even newcomers to the field with an instructive framework within which they can evaluate the current digital copyright environment and its more fascinating disputes.

A central thesis of Litman's piece is that current copyright law does not represent the public's interest and instead is the product of those with the most money to allocate towards drafting copyright laws that best protect their financial interests. By providing readers with a wonderfully understandable primer on the major developments in copyright statutory law throughout English, colonial, and American histories, Litman sets up her criticisms and proposals by contrasting them with the historical underpinnings of the development of copyright doctrine.

Litman suggests that copyright laws have historically been "full of holes" in order to function as a bargain between the public and the author. Today, however, copyright law has evolved into a system that is primarily designed to preserve creative incentives. Litman argument explains how much of today's copyright law is more about protecting

the property interests of copyright owners than about enhancing the ability of the public to access and learn from those works. Her historical analysis continues when Litman provides readers with her take on President Clinton's National Information Infrastructure Task Force ("NIITF").

In a particularly intriguing section of *DIGITAL COPYRIGHT*, Litman explains how the NIITF solicited perspectives and commentary from the public about what would need to be done before content developers would be willing to invest in the early national information infrastructures of the early 1990s. NIITF committees and conferences led to the drafting of important Green and White Papers that have had a profound impact on the development of digital copyright legislation. The early landscape of the NIITF and its hearings created a legislative environment in which large corporations in the fields of entertainment and technology were and continue to be able to shape the current character of federal copyright laws that affect everyone.

Litman notes an unfortunate result of what she perceives to be the over-expansion of copyright laws when she writes she points out that many if not most works are comprised of both protected and unprotected elements. An overbroad system of copyright laws can often err on the side of prohibiting the productive use of unprotected elements of a work. The unprotected elements of a work can include any ideas that it contains, as well as its underlying factual basis.

DIGITAL COPYRIGHT is full of Litman's common-sense approach to copyright laws. Litman points out that most "people don't obey laws they don't believe in." Her argument is not so much that people will actively protest copyright laws that they find repugnant, but rather that many people unfamiliar with the labyrinthine copyright law

codes simply do not believe that their conduct could unlawfully infringe the rights of the copyright owners. The Digital Millennium Copyright Act ("DMCA") she argues, is lengthy, internally inconsistent, and incredibly difficult even for experienced practitioners to understand and explain. Litman suggests that future copyright laws be short and clear so that even young people can more easily understand how the unlawful use of intellectual property is conceptually identical to the unlawful use of physical property.

Litman ultimately proposes that future formulations of copyright laws should be more concerned with how it is that we want the public to be able to interact with copyrighted works than it has been. She argues that the public interest is poorly represented in many of the larger debates over digital copyright (particularly the highly-publicized MP3.com and Napster fiascoes). Litman goes as far as to suggest that copyright laws should be most concerned with the effect that any particular use has on the copyright owner's ability to commercially exploit the copyrighted work.

I would feel comfortable in recommending DIGITAL COPYRIGHT to anyone who has been curious about the digital copyright laws and who could benefit from a more academic evaluation of them than that which is otherwise available in the news media. DIGITAL COPYRIGHT intelligently sets forth the important arguments that are raised by key players on all sides of these complicated issues. Litman's clarity of presentation and thorough research render her book a fine place to start one's exploration of what is certain to be an exciting field of both research and practice in the coming years.

Status: **Recommend**

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Footnotes

1. Jessica Litman, DIGITAL COPYRIGHT (2001).